

**CASE NO: INS/H/6/2017**

In the matter between:

The Complainant

and

Insurance Broker
Insurance Company
Bank Financier**1st Respondent****2nd Respondent****3rd Respondent**

STATEMENT OF DETERMINATION OF COMPLAINT GIVEN IN TERMS OF SECTIONS 74 AND 75 OF THE FINANCIAL SERVICES REGULATORY AUTHORITY ACT NO. 2 OF 2010 ("THE FSRA ACT").

1. INTRODUCTION

- 1.1. The Complainant lodged the complaint at the Office of the Ombudsman ("the Ombudsman") on 4 May 2017. The Complainant was a policyholder with Insurance Company as of 7 May 2013.
- 1.2. The Complainant took out the motor vehicle insurance policy to cover his newly purchased Opel Astra ("the motor vehicle"). The Insurance Company ("the Insurer") issued a motor policy,¹ with through the Insurance Broker (1st Respondent or "the Broker").
- 1.3. The motor vehicle purchase was facilitated through a motor vehicle finance agreement the Complainant had with the Bank Financier (3rd Respondent or "the Bank"). The Complainant had purchased two motor vehicles from the Bank, the other is not subject to the present complaint.
- 1.4. On 10 September 2016, the Complainant's motor vehicle was damaged as a result of an accident. After submitting his claim, a representative of the Broker phoned him to advise that his policy had been cancelled due to unpaid premiums.

2. THE COMPLAINT

- 2.1. The Complainant is not happy that the Insurer did not pay his claim citing premium default as a reason. The Complainant submits that since 2013 the Bank would make payment of the annual premium due to the Insurer through the Broker. He further

¹ As defined in the Interpretation, Section 2 of the Insurance Act 7 of 2005.

states, in a complaint letter to the Broker dated 21 March 2017, that: "I never got a single invoice as all transactions were done between you (the Bank and Broker)". In his submissions, the Complainant explains that he expected that if his policy had not been renewed, the Broker would have told him.

2.2. The Complainant submits letters he sent to both the Bank and the Broker to redress the matter, to which he did not receive a reply. The Complainant seeks redress from the Ombudsman of Financial Services. The complaint is against Insurer's decision to repudiate the claim and Complainant argues that all the Respondents are at fault for the policy premiums not being up to date at the time of the accident.

3. RESPONSE / DEFENCE

1st Respondent Broker

3.1. The Office of the Ombudsman received the Broker's response to the Complaint on 18 May 2017 and can be summarised as follows:

3.1.1. In its response, the Broker explains that the policy fell due for renewal on 13 May 2016. The Broker further states that they sent a renewal letter to the Complainant who in turn confirmed receipt of same. The Broker advises that they would send renewal notices to the Complainant and that the Bank would make the premium payments. The Broker submits that "A renewal letter dated 16 April 2016 was sent to the client, together with the renewal documents and invoice reflecting the required premium, which documents he confirmed to have received."

3.1.2. On 7 June 2016, the Broker followed up with the Bank about the payment and was told that the Complainant's account "had problems and was currently with their credit department as the bank was in the process of re possessing the assets.as the account was in arrears (sic)". The Broker had no further communication on the Complainant's account until the date the accident was reported to them.

3.1.3. The Broker holds the view that no fault lay with their office and that the matter is between the Complainant and the Bank.

2nd Respondent Insurer

3.2. The Insurer confirms that the Complainant's policy was cancelled with effect from 13 May. The reason given for the cancellation was non-payment of premiums to the Insurer. The cancellation was confirmed by way of a policy cancellation schedule which was signed on 31 August. The Insurer holds that they were well within their rights to cancel the policy as they had not received premium payment due in terms of the policy.

3.3. The Insurer is of the view that the complaint should be dismissed.

3rd Respondent Bank

- 3.4. The Bank is included as a Respondent in light of the Broker's and Complainant's assertion that payment was effected through the Bank. The Bank submitted a response on 07 December 2017. The Bank's final response was only received on 28 March 2018.
- 3.5. In its response, the Bank confirms that the Complainant had two VAF agreements with them. The first agreement was effective from May 2013 and the second was effective from October 2013. The agreement for the motor vehicle this complaint relates to was effective from May 2013.
- 3.6. On or about 30 April 2014, the Bank received an invoice in respect to the insurance premiums due by the Complainant. On receipt of the invoice the Bank states that it "assessed the two VAF agreements and at their discretion honoured the invoice request and paid insurance premiums to the Insurer, the premium payment totalled E44, 860.00."
- 3.7. The Bank further effected payment of the invoice received for premiums in July 2015. In May 2016, the Complainant's VAF loan accounts were not up to date and the Bank subsequently did not effect payment of the premiums.
- 3.8. The Bank further states that it held a meeting with the Broker after hearing about the accident and advised the Broker that "the Bank is the Financier and not the insurance Broker. The Bank's role was to communicate with the Complainant regarding the loan arrears status and the Broker had the role to communicate with the Compliant (sic) the insurance policy's status."
- 3.9. The Bank denies liability for the loss suffered by the Complainant.

4. DETERMINATION AND THE REASONS THEREFOR

- 4.1. The question before the Ombudsman is whether either of the Respondents is to be held liable for the non-payment of premiums. Subsequently, the Ombudsman is to consider whether the Insurer's decision to cancel the policy and to repudiate the claim was lawful and justified.

Insurer's liability under the policy

- 4.2. A motor vehicle insurance policy entails an undertaking by the Insurer to indemnify the Complainant against loss or damage to a vehicle as described in the policy, in exchange for a monthly premium. This is an indemnity insurance contract. The

Complainant is entitled to recover the actual commercial value² of what he has lost through the occurrence of the insured event.

- 4.3. The terms and conditions of a contract of insurance are embodied in a policy. The privileges and obligations of the parties should be set out in the policy in a clear way. This is an important document as it provides all the terms and conditions, rights and duties of the parties to the contract.
- 4.4. The payment of a premium appears in two sections of the policy document provided to the Complainant. The first mention is in the cover letter of the policy which reads as follows:

"This document, including **Your Policy Schedule** and **Your Schedule of Benefits**, together with the completed application form supplied when applying for this insurance, is **Your Travel Insurance Policy**, which constitutes a contract between **You** and **Us**. In return for payment of the **Premium** when due, **We** agree to insure **You** during the **Period of Insurance**, subject to the **Policy** Terms, Conditions and Exclusions.

The Preamble of the policy further states:

"Premium Payments

You are responsible for paying the **Premium** to **Us**. The **Premium** is due in advance. **We** will not be liable for any claims that occur prior to **Us** receiving **Premium**. **We** will not be obliged to accept **Premium** tendered to **Us** after the due date, but may do so at **Our** sole discretion and on such terms as **We** may determine. Notwithstanding anything to the contrary contained in this **Policy**, cover in respect of this **Policy** will not commence before the **Premium** has been received by **Us**."

- 4.5 It is clear from the above wording of the policy, the timely payment of the premiums was vital or essential to the contract. It is also clear that the duty to pay premiums was indicated as being that of the policyholder and Complainant in this instance.
- 4.6 In addition to the above, the policy schedule further indicates that the policy is to be renewed on a yearly basis. The Insurer submits a copy of the renewal schedule that was sent to the Broker dated 15 March ahead of the policy anniversary dated 13 May.
- 4.7 The Insurer cites non-payment of premiums as the basis for cancellation and further submits a copy of its agreement with the Broker in respect to premium payments. The agreement reads as follows:

"2.4 The Broker is entitled to accept premiums in respect of the policies on behalf of the Insurer and such premiums shall be paid to the Insurer 60 days from the date of policy inception or renewal (provided same has been received by the Broker within

² *Nafte v Atlas Assurance Co Ltd* 1924 WLD 239.

such stipulated period), and any interest earned within the 60 day period shall accrue to the benefit of the Broker or within any other credit period as may be prescribed by the Insurance Act of Swaziland. The Broker is to ensure timeous payment of premiums (i.e. on the 5th of each month after expiry of the 60day credit period) in order to avoid compromising the effect of The Service Charter.

2.5 In the event the premium is not paid on due date, the premium will be reversed and the policy treated as 'not taken up' or lapsed as the case may be, unless otherwise agreed by the Insurer in writing. "

4.8 The date on the Insurer's notice of cancellation is 31 August 2016. This is a date 110 days after the renewal date of the policy. In light of the provisions of the policy and agreement with the Broker, the Insurer cannot be found to have been at fault in cancelling the policy.

Bank's liability under the Vehicle Asset Financing agreement

4.9 The VAF agreement between the Bank and the Complainant contains the following provision relating to insurance of the vehicle:

"8. Insurance

8.1 Lessee shall immediately insure the goods with [the preferred insurance company], and at all times keep the goods fully insured for their market value from time to time under a separate insurance policy against such risk of loss, damage, destruction or mechanical breakdown as property of the nature of goods are ordinarily insured. The respective rights and interests of Lessor and Lessee shall be noted on the policy.

8.2 Lessee shall punctually pay all insurance premiums and shall, on demand, produce written proof to Lessor that the goods are insured and that all premiums due in terms of the policy have been timeously paid. Lessor shall be entitled (but not obliged) to pay the insurance premiums and/or any other monies which may become due on the said insurance policy on behalf of Lessee and the premium and/or any other monies so paid shall be re-payable to Lessor by Lessee on demand. Lessee hereby authorises Lessor to debit Lessee's account with Lessor as and when such monies are paid by Lessor on behalf of Lessee.

8.3 In the event of the said insurance policy becoming of no force or effect for any reason whatsoever, Lessor shall be entitled, in its sole and absolute discretion, to insure the goods as contemplated in paragraph 8.1 above and to pay the premium and/or any other monies due thereon on behalf of Lessee. Lessee shall be obliged to refund such monies to Lessor on demand and Lessee hereby authorises Lessor to debit Lessee's account with Lessor in respect of monies so paid by Lessor.

8.4 Lessee shall comply with all the terms, conditions and warranties of every insurance policy effected in terms of this agreement.

8.5 Lessee hereby cedes to Lessor as security for the due performance of Lessee's obligations in terms of this agreement all of Lessee's right, title and interest in any insurance policy effected in terms of this agreement and undertakes to deliver such policy to Lessor on demand. "

- 4.10 From the above, it is clear that the Bank had a discretion and not a duty to pay for the insurance premiums for the vehicle. The Bank states that it “declined to increase its exposure due to the behavioural traits of the VAF loan account”.
- 4.11 From the statement of account submitted by the Bank, it appears that at the date on which the policy was due for renewal, the Complainant’s account was 3 months in arrears. The debit order sent by the Bank on 02 December 2015, 02 January 2016 and 25 February 2016 had all been rejected due to insufficient funds.
- 4.12 In light of the state of the Complainant’s account, the Bank cannot be said to have exercised their discretion unreasonably. This is in light of the nature of the business of the Bank primarily being that of a financing agent with the legal right to manage its risk exposure in light of each client’s account.
- 4.13 In addition to the clause dealing with Insurance, the VAF agreement clause 5 states: “As between Lessee and Lessor, risk in the goods shall pass to Lessee on the earlier of signature hereof by Lessee or the date when Supplier ceases to bear the risk until such time as the goods are returned to Lessor.”
- 4.14 From inception of the VAF agreement, the Complainant assumed all Risk relating to the vehicle purchased through financing by the Bank, for as long as he had the goods. The Bank as owner and lessor of the vehicle had a stake in the vehicle; however, the managing and insuring of the Risk was evidently the duty of the Complainant.
- 4.15 The Bank alleges that the decision not to insure the vehicle had been communicated timeously to the Broker who acted as the intermediary with the Complainant. The Broker’s duties will subsequently be addressed below. However, for purposes of assigning liability to the Bank under the VAF agreement, the Office of the Ombudsman cannot find against the Bank in the approach taken in light of the Complainant’s VAF loan account.

Duties of the Broker

- 4.16 At the most basic level, a Broker’s duty is to mediate insurance contracts between an insurer and an insured³. Both the Broker and Bank confirm that the renewal notice had been forwarded to the Bank in light of the fact that the Bank had effected payments of the premium in 2014 as well as 2015. The fact that the Complainant had in previous years not objected to this process indicates that it was an accepted practice between the parties. The Broker submits that a copy of the notice was forwarded to the Complainant to the last known address and that the Complainant has failed to prove that he would have not received notice.

³ Havenga, P (2012). *The Law of Insurance Intermediaries*. Claremont: JUTA law. 44-46.

4.17 In addition to the above, the Complainant would have been aware of the state of his loan account and annual premium payment obligations. The Complainant may have sought to redress the matter during the 3-month period between the renewal date of his policy and the date of the accident.

Finding

The Broker took the steps that could reasonably be expected of a Broker in the circumstances. The Broker is found to have acted in good faith and did not breach its legal obligations.

A period close to four months passed after the cancellation of the policy, in which the Complainant could have remedied the situation with the Insurer and the Bank. The Complainant failed to meet his financial obligations in respect to the VAF agreement and therefore could not reasonably expect that his policy would have been up to date.

Order

1. The Complaint is not upheld.
2. No order is made against the 1st, 2nd and 3rd Respondents.

THUS DONE AT MBABANE ON THIS 09 DAY OF APRIL 2018 AND CERTIFIED A TRUE AND CORRECT DETERMINATION OF THE OMBUDSMAN OF FINANCIAL SERVICES IN TERMS OF SECTION 75(5) OF THE FINANCIAL SERVICES REGULATORY AUTHORITY ACT OF 2010.

OMBUDSMAN OF FINANCIAL SERVICES